

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY MARQUET CAMPBELL,

Plaintiff,

No. CIV S-04-2050 DFL GGH P

vs.

J. WOODFORD,¹

Defendant.

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. By order filed March 24, 2005, plaintiff's complaint was dismissed with leave to file an amended complaint. Plaintiff has filed an amended complaint.

As plaintiff has been informed, the court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

¹ The court has corrected plaintiff's misidentification of the Director of the California Department of Corrections as "G. Woodford."

1 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
 2 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
 3 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
 4 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
 5 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
 6 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
 7 Cir. 1989); Franklin, 745 F.2d at 1227.

8 A complaint, or portion thereof, should only be dismissed for failure to state a
 9 claim upon which relief may be granted if it appears beyond doubt that plaintiff can prove no set
 10 of facts in support of the claim or claims that would entitle him to relief. See Hishon v. King &
 11 Spalding, 467 U.S. 69, 73 (1984), citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also
 12 Palmer v. Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing
 13 a complaint under this standard, the court must accept as true the allegations of the complaint in
 14 question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), construe the
 15 pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor.
 16 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

17 Plaintiff alleges that he was assessed a 90-day loss of credit pursuant to a serious
 18 Rules Violation Report (RVR). He states that he was provided his copy of the RVR on January
 19 10, 2005, which apparently was later than 24 hours after the RVR was classified as serious,
 20 allegedly in violation of the California Code of Regulations. Plaintiff does not set forth the relief
 21 he seeks, although in his original complaint he sought money damages.

22 In the court's prior order, plaintiff was informed that:

23 State regulations give rise to a liberty interest protected by the Due
 24 Process Clause of the federal constitution only if those regulations
 25 pertain to "freedom from restraint" that "imposes atypical and
 26 significant hardship on the inmate in relation to the ordinary
 incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484, 115
 S. Ct. 2293, 2300 (1995). Plaintiff has failed to set forth how he
 was impacted by receiving his copy of the serious RVR allegedly

1 untimely nor the result of any related prison disciplinary hearing.
2 Plaintiff is entitled to advance written notice of the rules violation
3 and no less than 24 hours to prepare for any disciplinary hearing
4 (as well as a “written statement by the factfinders as to evidence
5 relied on and reasons for the disciplinary action”). Wolff v.
6 McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 2979 (1974).
7 Plaintiff does not allege that he was not allowed sufficient notice
8 prior to any hearing, but rather that he was not given the RVR
9 within 24 hours of its having been found “serious.” No claim of a
10 violation of procedural due process has been framed.

11 See Order, filed on March 24, 2005, pp. 3-4.

12 Although plaintiff has now clarified that he suffered a 90-day credit loss as a
13 result of the prison disciplinary hearing related to the RVR at issue, plaintiff has not cured the
14 defects of the original complaint in this amended pleading. In addition, to the extent that plaintiff
15 intended to request relief in the form of money damages and assuming he had framed a colorable
16 due process claim, plaintiff’s claim, since he has now clarified that he was assessed a 90-day
17 credit loss, is Heck-barred, as, again, he was informed by the earlier order. See, Order filed on
18 March 24, 2005, at pp. 4-5.

19 In Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994), an Indiana state
20 prisoner brought a civil rights action under § 1983 for damages. Claiming that state and county
21 officials violated his constitutional rights, he sought damages for improprieties in the
22 investigation leading to his arrest, for the destruction of evidence, and for conduct during his trial
23 (“illegal and unlawful voice identification procedure”). Convicted on voluntary manslaughter
24 charges, and serving a fifteen year term, plaintiff did not seek injunctive relief or release from
25 custody. The United States Supreme Court affirmed the Court of Appeal’s dismissal of the
26 complaint and held that:

 in order to recover damages for allegedly unconstitutional
 conviction or imprisonment, or for other harm caused by actions
 whose unlawfulness would render a conviction or sentence invalid,
 a § 1983 plaintiff must prove that the conviction or sentence has
 been reversed on direct appeal, expunged by executive order,
 declared invalid by a state tribunal authorized to make such
 determination, or called into question by a federal court’s issuance

1 of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages
2 bearing that relationship to a conviction or sentence that has not
been so invalidated is not cognizable under 1983.

3 Heck, 512 U.S. at 486, 114 S. Ct. at 2372. The Court expressly held that a cause of action for
4 damages under § 1983 concerning a criminal conviction or sentence cannot exist unless the
5 conviction or sentence has been invalidated, expunged or reversed. Id.

6 _____ In Edwards v. Balisok, 520 U.S. 641, 117 S. Ct. 1584 (1997), the Supreme Court
7 held that Heck applies to challenges to prison disciplinary hearings when the nature of the
8 challenge to the procedures could be such as necessarily to imply the invalidity of the judgment.
9 Edwards rejected the Ninth Circuit's holding in Gotcher v. Wood, 66 F.3d 1097, 1099 (9th Cir.
10 1995) that a claim challenging only the procedures employed in a disciplinary hearing is not
11 barred by Heck. Although plaintiff claims to have filed a habeas petition with respect to the
12 insufficiently identified RVR at issue in his amended complaint, he does not aver that the prison
13 disciplinary finding was reversed or expunged and that his credit loss was restored; in fact,
14 plaintiff implies that the habeas petition is still pending.

15 Plaintiff's amended complaint completely fails to cure the defects of his original
16 complaint. "A pro se litigant must be given leave to amend his or her complaint unless it is
17 'absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" Noll,
18 809 F.2d 1446, 1448 (quoting Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th
19 Cir.1980) (per curiam)); accord Eldridge v. Block, 832 F.2d 1132, 1135-36 (9th Cir.1987).
20 Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir. 1988).

21 "Under Ninth Circuit case law, district courts are only required to grant leave to
22 amend if a complaint can possibly be saved. Courts are not required to grant leave to amend if a
23 complaint lacks merit entirely." Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000). See also,
24 Smith v. Pacific Properties and Development Corp., 358 F.3d 1097, 1106 (9th Cir. 2004), citing
25 Doe v. United States, 58 F.3d 494, 497(9th Cir.1995) ("a district court should grant leave to
26 amend even if no request to amend the pleading was made, unless it determines that the pleading

1 could not be cured by the allegation of other facts.”) The court will recommend dismissal of this
2 action for plaintiff’s failure to state a claim upon which relief can be granted.

3 Accordingly, IT IS RECOMMENDED that this action be dismissed for failure to
4 state a claim.

5 These findings and recommendations are submitted to the United States District
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
7 days after being served with these findings and recommendations, plaintiff may file written
8 objections with the court and serve a copy on all parties. Such a document should be captioned
9 “Objections to Magistrate Judge's Findings and Recommendations.” Plaintiff is advised that
10 failure to file objections within the specified time may waive the right to appeal the District
11 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

12 DATED: 8/24/05

13 /s/ Gregory G. Hollows

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UNITED STATES MAGISTRATE JUDGE

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